UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, DC

STERICYCLE, INC.,	)		
	)		
Respondent,	)		
	)		
And	)	Case Nos.	04-CA-137660
	)		04-CA-145466
	)		04-CA-158277
TEAMSTERS LOCAL 628	)		04-CA-160621
	)		
Charging Party	)		

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS

Charles P. Roberts III
Constangy, Brooks, Smith & Prophete LLP
100 N. Cherry Street, Suite 300
Winston-Salem, NC 27101
Tel: (336) 721-1001
Fax: (336) 748-9112
croberts@constangy.com

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Other Authorities

STATEMENT OF CASE

Respondent is engaged in the business of providing medical waste and collection treatment services to commercial customers throughout the United States. It operates facilities located in Southampton and Morgantown, Pennsylvania, at which its employees are represented by Teamsters Local 628 (Union) in separate bargaining units. On September 29, 2014, the Union filed an unfair labor practice charge (04-CA-137600) alleging that Respondent had at its Southampton facility violated section 8(a)(5) of the Act by failing to provide certain relevant information and by unilaterally implementing a plan to make retroactive deductions from employees' paychecks to recoup unpaid health care contributions. Additional charges were filed thereafter, and a series of complaints were issued by the Regional Director, culminating in a Second Consolidated Complaint, which issued on March 29, 2016, as further amended on May 16, 2016, and again at the hearing on August 24, 2016. Respondent filed answers, denying the material allegations of the complaints. In its Answer to the Second Consolidated Complaint, Respondent raised the following Eighth Affirmative Defense:

> The Second Consolidated Complaint is tainted by the involvement of the Regional Director of Region 4 and should be transferred to a different region for independent review, reconsideration, and processing. As reflected in the report issued by the Inspector General in OIG-I-516, the Regional Director for Region 4 has a substantial conflict of interest as a result of his service as Chairman of the Peggy Browning Fund from 2011 until August 2015, when he was compelled to resign his position with the Fund. Although the Regional Director has indicated in the Second Consolidated Complaint that he has recused himself from this matter, he did not recuse himself from the issuance of the original Complaint (04-CA-137660) on January 27, 2015 or the issuance of the Consolidated Complaint (04-CA-137660, 04-CA-145466) on April 3, 2015. Thus, these proceedings are inherently tainted, and the only appropriate remedy is to transfer the matter to a different Region for independent review, reconsideration, and processing.

A hearing on the Second Consolidated Complaint was scheduled for May 31, 2016. On May 16, 2016, the General Counsel filed a motion in limine seeking to preclude Respondent

from presenting evidence on, or otherwise litigating, its Eighth Affirmative Defense. On May 19, 2016, Respondent filed a motion to dismiss without prejudice with the Division of Judges. Rather than rule on the motions, the Chief Administrative Law Judge suggested to the parties that the motion to dismiss be filed directly with the Board. The hearing was postponed until August 24, 2016, and on June 29, 2016, Respondent filed a motion to dismiss with the Board. On August 19, 2016, the Board issued an order referring Respondent's motion to dismiss back to the Division of Judges. On August 24, 2016, Administrative Law Judge Michael A. Rosas issued an order denying Respondent's motion to dismiss. He also denied Respondent the right to call witnesses or present evidence on its Eighth Affirmative Defense beyond that which had been submitted with Respondent's motion. This matter was heard in Philadelphia, Pennsylvania, before Judge Rosas on August 24 and 25, 2016. On November 10, 2016, Judge Rosas issued his recommended decision finding certain unfair labor practices, but dismissing other allegations. Respondent now files its exceptions along with this supporting brief.

STATEMENT OF FACTS

A. Background

The Southampton facility is a transfer station, and the Union has represented its drivers, driver techs, in-house techs, helpers, dockworkers, and long haul drivers since 1999. (Tr. 33, GC Exh. 2, p. 1). [1] There are approximately 105 employees in this unit. (Tr. 33-34). These employees pick up "regulated medical waste" ("RMW") such as bandages, sharps containers, and bodily fluids from various medical facilities. The Southampton collective bargaining agreement was effective from November 1, 2013 through October 31, 2016. (GC Exh. 2).

[1] References are to the transcript of the hearing (Tr.) and the exhibits (Resp., GC, or CP Exh.) introduced into evidence. References to the ALJ's decision are designated as "JD" followed by the appropriate page and line number(s).

The Union was certified as the representative of the Morgantown employees in September 2011. Unlike Southampton, Morgantown is a treatment facility. RMW is delivered to the facility, where it is processed, chemically treated, and shredded in a Chemical Clave treatment system that is unique and proprietary to Respondent. The resulting product is placed in containers and disposed of in landfills. (Tr. 34-36, 232, 241). There are approximately 55 employees in the unit. (Tr. 36). The Morgantown collective bargaining agreement was effective from date of ratification (on or about September 6, 2013) through February 29, 2016. (GC Exh. 3; Tr. 37). At the time of the hearing, the parties had recently reached a new agreement for Morgantown. (Tr. 36-37).

B. The Distribution of an Employee Handbook at Morgantown

It is undisputed that Respondent distributed an employee handbook to the Morgantown employees on February 26 and 27, 2015. (GC Exh. 32). The handbook was not distributed to the Southampton employees. (Tr. 110). Although a number of provisions in the handbook are inconsistent with the Morgantown CBA, (Tr. 90-106), the handbook states: "Some benefits may not apply to union team members and in some cases the policies may be impacted by collective bargaining agreements." (GC Exh. 22, p. 1). There is no evidence that Respondent actually applied the handbook inconsistently with the Morgantown CBA. (Tr. 110, 131-137).

C. Alleged Unlawful Policies

The Judge found the following Morgantown policies (italicized provisions) to be overly broad and unlawful under § 8(a)(1) of the Act:

1. Harassment Complaints

The employee handbook distributed to Morgantown employees in February 2016 contained a detailed policy prohibiting harassment of all types, including, but not limited to,

sexual harassment. (GC Exh. 22, pp. 8-9). In a separate section, entitled "Retaliation," the handbook provides:

> Stericycle strictly prohibits unlawful retaliation against any team member or applicant for employment who reports discrimination or harassment, or who participates in good faith in any investigation of unlawful discrimination or harassment.
>
> **What action should you take if you feel you have been a victim of harassment or retaliation?**
>
> If you believe you have been the victim of harassment or retaliation of any kind, immediately do the following:
>
> 1. If you feel comfortable doing so, we encourage you to tell the person in no uncertain terms to stop; and
>
> 2. Report the incident and the name of the individual(s) involved to your Human Resources Representative. If you cannot report the issue to your Human Resources Representative for any reason, contact the Team Member Help Line at [Phone Number]. The Help Line accepts anonymous complaints of any kind.
>
> All complaints will be promptly investigated. *All parties involved in the investigation will keep complaints and the terms of their resolution confidential to the fullest extent practicable.*

(GC Exh. 22, p. 10).

2. Personal Conduct Policy

The Morgantown handbook contained the following section regarding "Personal Conduct":

> *In order to protect everyone's rights and safety, it is the Company's policy to implement certain rules and regulations regarding your behavior as a team member. Conduct that maliciously harms or intends to harm the business reputation of Stericycle will not be tolerated. You are expected to conduct yourself and behave in a manner conducive to efficient operations. Failure to conduct yourself in an appropriate manner can lead to corrective action up to and including termination.*

The following are some examples of infractions, which could be grounds for corrective action up to and including termination, however this list is not all-inclusive.

-- Possession, consumption, distribution or sale of alcohol, drugs or illegal substances while on premises, or reporting to work under the influence of the above mentioned items.

-- Carrying or possessing firearms or weapons of any kind on the Company's property or while engaged in Company assignments

-- Theft

-- Pilfering of waste

-- Use of profanity or inappropriate language while on Stericycle premises whether on duty or not.

-- Gambling on Stericycle premises

-- Acts of violence

-- *Engaging in behavior which is harmful to Stericycle's reputation*

-- Falsifying any Stericycle record or report, including but not limited to an application for employment, a time record, a customer record, manifest, invoices, receiving records, etc.

-- Willfully defacing, damaging, or unauthorized use of Company property or another team member's property

-- Sleeping on the job

-- Continued or excessive absenteeism or tardiness

-- Violation of safety and/or operating rules

-- Smoking or "Vaping" in "No Smoking" areas

-- Refusing to follow the directions of a supervisor or otherwise being insubordinate

-- Violation of the Sexual Harassment policy

-- Failure to punch/swipe in and out when appropriate or punching in/out for other team members

(GC Exh. 22, p. 30).

3. Conflicts of Interest

The Morgantown handbook contained the following Conflict of Interest policy:

Stericycle will not retain a team member who directly or indirectly engages in the following:

-- *An activity that constitutes a conflict of interest or adversely reflects upon the integrity of the Company or its management.*

-- An activity in which a team member obtains financial gain due to his/her association with the Company.

-- An activity, which by its nature, detracts from the ability of the team member to fulfill his/her obligation to the Company.

(GC Exh. 22, p. 33).

4. Camera & Video Use Policy

Respondent's Morgantown facility is a medical waste treatment facility. It is the only Chemical Clave treatment plant in the country. The equipment utilized at the facility was developed specifically for Respondent and is unique in the industry. The process consists of shredding the waste and chemically sterilizing it through a process of steam and sodium hydrochloride. (Tr. 232-233, 241). In order to protect its proprietary processes, a separate Camera & Video Use policy was maintained at Morgantown (Tr. 230-231):

1.0 PURPOSE

To ensure that proprietary information, treatment processes, equipment, transfer station operations and warehouse operations remain under the control of Stericycle, Inc.

2.0 SCOPE

This policy applies to all employees working for Stericycle, Inc., vendors and visitors to Stericycle facilities.

3.0 CAMERA USAGE

3.1 Team members are prohibited from taking pictures with a personal or company issued camera or cell phone camera of any Stericycle property, operation, or equipment without the permission of their supervisor/manager.

3.2 Visitors or vendors are prohibited from taking any pictures with a personal camera or cell phone camera of any Stericycle property, operation, or equipment without the permission of Stericycle management.

3.3 Regulatory agencies (i.e. OSHA, DOT or other agency) may take photographs as part of their inspection.

4.0 VIDEO AND TAPE RECORDING

4.1 *Team members are prohibited from taking video or audio recordings with a personal or company camera, camcorder, or other device of any Stericycle property, operation, or equipment without the permission of their supervisor/manager.*

4.2 Visitors or vendors are prohibited from taking video or audio recordings with a personal or company camera, camcorder, or other device of any Stericycle property, operation, or equipment without the permission of Stericycle management.

4.3 Regulatory agencies (i.e. OSHA, DOT or other agency) may take video or audio as part of their inspection.

(GC Exh. 30).

D. Alleged Refusals to Furnish Information

1. Article 23.3 Requests

Article 23.3 of the Southampton CBA provided that unit employees would receive bi-weekly an amount consisting of $0.3125 per hour on a "pre-tax" basis, provided that employees made an appropriate election into either Stericycle's 401K Plan or Employee Stock Purchase Plan, which amounts would be treated as "employee deferral contributions" subject to the terms and conditions of the relevant Plan[s], as applicable. Following the ratification of the CBA in April 2014, a dispute arose concerning the Union's contention that Respondent was not properly administering this provision. The Union filed a grievance on or about June 2, 2014, alleging that Respondent "has failed to remit the $0.312 per hour on a pre-tax basis for all straight-time hours paid to each active non-probationary bargaining unit employees' 401k account or Stock Purchase Plan as required by the Collective Bargaining Agreement." (GC Exh. 11). On September 4, 2014, the Union demanded arbitration. (Resp. Exh. 5). The following day, September 5, 2014, the Union submitted an eight-paragraph request for information entitled "Grievance – Violation of Article 23, subsection 23.3 Dated June 2, 2014." (GC Exh. 12). On September 18, 2016, the Union submitted an additional three-paragraph request for information related to "Grievance --

Violation of Article 23, subsection 23.3." (GC Exh. 14). On September 22, 2014, Respondent responded to both the September 5 and the September 18 requests. (GC Exh. 15 B).

The Judge found that Respondent unlawfully failed to furnish the Union with "internal communications and meeting and bargaining notes requested by the Union on September 5 and 18, 2014, relating to the Company's implementation of Article 23.3." (JD 32: 42-44). These requests and Respondent's initial responses are set forth below:

September 5

6. Provide copies of any communications, written or electronic between any Stericycle representatives or agents concerning or relating to Stericycle's implementation of Article 23, subsection 23.3 of the Collective Bargaining Agreement.

   The Company will not be providing this documentation as it bears no relevance to the Union's prosecution of the above-mentioned Case and is aimed solely at discovering the Company's legal theory and strategy in the arbitration of the same.

8. Provide copies of the meeting notes of Stericycle's representatives or its agents taken during the meetings identified in number 7 above [meetings at which Stericycle discussed its obligations under Article 23.3].

   The Company denies this request for the reasons cited in number 6.

September 18

1. Copies of all documents, including bargaining notes, regarding discussions over the Southampton 401 (k) provision during negotiations leading to the November 1, 2013 through October 31, 2016 collective bargaining agreement, showing, the dates of each session, the names of those present, the start and end time of sessions and breaks, sidebar discussions or other communications between sessions, and communications concerning bargaining before or after sessions whether in person, writing or telephone.

   Again, the Company objects to this request on the grounds that it seeks the Company's legal theories and defenses related to the above-referenced arbitration. The Company also denies this request on the grounds that the Union's requests for its notes are irrelevant to the Union's own position taken with respect to the grievance. Further, the Company maintains its bargaining notes are confidential.

The Union did not respond further until August 18, 2015, when the Union's counsel issued a subpoena to Respondent in conjunction with the arbitration of the Union's grievance, scheduled to commence on September 10, 2015. (CP Exh. 1; Resp. Exh. 7, p. 2; Tr. 278-279). In many respects, the subpoena mirrored the Union's prior information requests. As material here, paragraph 2 of the subpoena sought documents relating to Respondent's "implementation of Article 23.3," clearly encompassing the documents requested in paragraphs 6 and 8 of the September 5, 2014 request. At that time, with an arbitration hearing scheduled for September 10, 2015, Respondent's counsel reevaluated the Union's request and concluded that the Union was entitled to certain "[d]ocuments concerning or relating to Stericycle's implementation of Article 23.3 of the November 1, 2013 to October 31, 2016 collective bargaining agreement," Thus, on September 4, 2015, Respondent furnished 38 pages of documents directly related to the implementation of Article 23.3. (Resp. Exh. 7, pp. 7-40). Respondent, however, declined to provide the Union with Respondent's bargaining notes. The arbitration hearing commenced on September 10, 2015. At the hearing, the arbitrator revoked the Union's subpoena to the extent it sought the Company's bargaining notes. (Tr. 311). Two hearing days have occurred, but the hearing had not concluded as of the time of the unfair labor practice hearing. (Tr. 51, Tr. 276-277).

2. Article 22.3 Requests

On September 11, 2014, Dagle sent Riess a letter requesting information regarding "Article 22, subsection 22.3," (GC Exh. 5), to which Respondent (through Labor Relations Manager Carol Fox) responded on September 22, 2004. (GC Exh. 7). Paragraphs 1 and 5 are the only paragraphs in issue in this proceeding. These requests and Respondent's initial responses are set forth below:

1. Provide copies of any communications, written or electronic between any Stericycle representatives or agents concerning or related to Stericycle's decision to deduct the amounts (copy enclosed) evenly over the next three (3) paydays for each employee starting with the September 12, 2014 payday.

   The Company fails to see the relevance its own internal communications have on whether the Company violated the contract as alleged by the Union, i.e., whether the catch-up deductions violate the wage provisions or the above-cited provision of the contract. For this reason and because many of those same communications are privileged and/or confidential, the Company will not be furnishing the information. If there is any specific communication which you believe is relevant, please identify it so the Company can make a further assessment of its duty to furnish it.

5. Provide copies of any communications, written or electronic between any Stericycle representatives or agents regarding Stericycle's implementation of Article 22, subsection 22.3 of the Collective Bargaining Agreement.

   This request is unclear. In terms of any internal communications that were not provided to employees or the Union, these communications are confidential, privileged and irrelevant.

On September 26, 2014, the Union submitted an additional request for information regarding "Article 22, subsection 22.3," (GC Exh. 8), to which Fox responded on October 17, 2014. (GC Exh. 9). Paragraph 3 of this request is in issue:

3. Provide copies of Stericycle's bargaining notes, including notes of side bar discussions or other contacts with Union representatives concerning, or relating to discussion of employee health coverage deductions.

   The Company objects to this request on the grounds that its internal bargaining notes are confidential and irrelevant to the fact of whether or not there has been a violation of the CBA as claimed by the Union. As far as the other information pertaining to contacts with Union representatives, this request is overly broad, as the Company has had many such contacts and conversations. Please provide a specific timeframe and if you can, reference to a specific communication.

Dagle responded further on October 20, 2014. Regarding paragraph 3, Dagle reiterated his request for bargaining notes, but with respect to other notes, he requested "notes (and/or other documents) related to conversations between Stericycle representatives and the union over the

employer's failure to deduct employee health contributions from the date of ratification to the date of this letter." (GC Exh. 10).

In the meantime, counsel for Respondent and counsel for the Union had been negotiating a confidentiality agreement to address some of Respondent's concerns. On or about November 17, 2016, an agreement was reached, and on November 19, 2016, Respondent furnished the Union with 41 pages of internal communications regarding Respondent's efforts to implement Article 22.3. (Resp. Exh. 9).

3. Ebola "Video"

On or about November 12, 2014, Safety Manager Ron Maggiaro gave a power point presentation to Morgantown employees on Ebola waste. Although Respondent does not handle Class-A medical waste (Ebola etc.), the Ebola issue was in the news at the time and questions had arisen from employees. During the presentation, which lasted 10 to 15 minutes, Maggiaro discussed how and where the virus originated and how it was introduced to the United States. He also presented slides showing the packaging requirements for Ebola waste, which made the waste easily identifiable. Employees were not given copies of the presentation. (Tr. 227-230).

On November 13, 2014, Dagle sent Maggiaro an email requesting "a copy of the EBOLA video which you had bargaining unit employees view at your safety meeting yesterday." On November 18, 2014, Dagle sent another email to Maggiaro stating that he would be in Morgantown for a meeting that day and that he would pick up a copy of the EBOLA video. (GC Exh. 17). Later that day, Carol Fox responded, noting that Respondent only handled RMW, not Class A waste such as Ebola. Fox explained that the Company "decided to educate our employees on the Company's activities related to Ebola," that the presentation was "confidential and proprietary," and that release of this information "could cause a great deal of speculation and

public concern if it was released to third-parties outside our organization." Fox declined to provide a copy of the presentation, but offered "to review the power-point presentation with [Dagle] . . . at a mutually convenient time at our offices." Dagle responded on November 19, questioning the validity of the expressed confidentiality concerns, but stating that the Union would "agree that the power-point presentation will not be shared with anyone outside the union's officers, representatives and agents." On November 25, 2014, Fox responded as follows:

> As I previously stated, these materials are extremely sensitive and you should know that Stericycle has spent a great deal of time answering questions from the public and other regulators surrounding whether EBOLA contaminated waste will be transported and/or treated within their town, municipality, jurisdiction etc. Many of these questions came from mere speculation and panic a situation that we are trying to avoid. For this reason, we did not permit any of the Morgantown employees to receive copies of the materials we presented to them. We only shared with them the presentation in person that I already offered to share with you. As I already stated to you, these employees will not transport the waste as it is outside their position duties. We simply presented them with the information because we want to educate all the employees on our activities in this area.
>
> Again, my offer to present to you, at a mutually convenient time, the same materials that we presented the employees still stands.

(GC Exh. 18, pp. 1-2).

On December 1, 2014, Dagle responded, stating that Respondent's "proposal to just let me view the presentation is inadequate" as "Local 628 needs to verify the accuracy of the information you are providing represented employees to ensure that their safety is adequately protected." To this end, "Local 628 must submit a copy to professional experts in the infectious disease and biosafety field for their review," and requiring the expert to come to Morgantown "would be neither cost effective nor practical." Dagle reiterated the Union's willingness to bargain over a confidentiality agreement. (GC Exh. 18, p. 1). On January 16, 2015, Respondent posted a notice at Morgantown explaining that employees were not to handle Ebola waste and

that the Ebola presentation had been given for informational purposes only. Respondent provided Dagle with a copy of the notice on January 20, 2015. (Resp. Exh. 4; Tr. 147).

4. Vehicle Backing Program

Employee James Clay was involved in an accident, which subjected him to discipline under Respondent's repeater policy. (Tr. 212). Dagle and Transportation Manager Robert Schoennagle were scheduled to meet on this issue on November 28, 2014. On November 24, 2014, Dagle requested a number of documents, including a "copy of the Company's vehicle backing program." (GC Exh. 19; Resp. Exh. 10; Tr. 66-67). Schoennagle forwarded the information, except for the vehicle backing program, to Dagle on November 25, 2014. (Resp. Exh. 10; Tr. 213-214). Schoennagle and Dagle met as scheduled on November 28, 2014. During this meeting, Schoennagle explained that the backing program consisted of a video purchased from an outside vendor and a power point presentation created by Stericycle. He further advised Dagle that he did not have a copy of the vehicle backing program and would need to inquire further. (Tr. 67, 215-216).

No grievance was filed by the Union, (Tr. 225), and by all appearances, the issue lay dormant until late January 2015, when Dagle inquired again. (Tr. 167). At that time, Schoennagle told him that the program was proprietary and could not be provided. (Tr. 67-68; Tr. 216-217). However, on January 29, 2015, Schoennagle sent Dagle an email offering to allow the Union to "sit in on a presentation of this program." (GC Exh. 20; Tr. 68). Dagle did not pursue this offer. (Tr. 69-70, 168). On January 30, 2015, the Union filed a charge alleging that Respondent was unlawfully refusing to furnish the vehicle backing program. On March 2, 2015, Carol Fox responded further to Dagle. Fox stated that although Respondent considered the power point presentation to be confidential and proprietary, it was nevertheless providing a copy, which

she attached with her response. However, the video was a copyrighted product produced by J.J. Keller, an outside vendor, which Respondent was licensed to show to employees, but was not permitted to make copies. Fox offered to set up a time for Dagle to view the video. Alternatively, she provided a link to the J.J. Keller website, where the Union could purchase a copy of the video. (GC Exh. 21). Dagle, however, never pursued either option and never visited the Keller website. His categorical position was that if Respondent showed any video or presentation of any type to employees, the Union was entitled to a copy at no cost. (Tr. 168-169, 217-218).

5. Harassment Training Video

On December 30, 2014, Dagle requested "a copy of the Code of Conduct and Harassment Training video which the Company had bargaining unit employees view in its training." Morgantown Plant Manager Mike Valtin responded later that day as follows: "The Code of Conduct and Harassment Training video are proprietary and can be available for you to view; however, the Company cannot give you a copy." (GC Exh. 26). Dagle made no effort to view the video. (Tr. 150). The video itself is a 10 to 15 minute video that was commissioned by Respondent from a law firm in Chicago and consisted of a "lawyer" interviewing a "client" and answering questions from the client regarding harassment. (Tr. 252-253).

6. 2014 Employee Handbook

On December 1, 2014, Dagle made a request for "a copy of the current Employee Handbook employees must sign." (GC Exh. 18). Fox did not respond to this request until March 2, 2014, when she advised Dagle that "it appears that the Company has not distributed or maintained Handbooks in Southampton since 2009 and Morgantown since 2011." She attached a copy of the 2015 handbook. (GC Exh. 21). The handbook was distributed to Morgantown

employees on February 26 and 27, 2015. (GC Exh. 32; Tr. 90). The handbook was not distributed at Southampton. (Tr. 109).

E. Alleged Unilateral Recoupment of Health Care Premiums [2]

Article 22.3 of the Southampton CBA provided (for the first time) that upon "ratification," employees would contribute "one (1 %) of their straight time hours paid per week to the cost of health coverage." Respondent was authorized to "deduct this amount bi-weekly and offset it against the employer's monthly contributions to the Teamsters Health and Welfare Fund." (GC Exh. 2, p. 12; Tr. 38, 112). Following ratification, Respondent experienced administrative difficulties in setting up the deductions, and no deductions were made through the spring and summer months. (Tr. 38-39, 114, 188-189). These issues were eventually resolved, (Tr. 189-190), and on Wednesday, September 3, 2014, (2:51 p.m.), Riess emailed Dagle and advised him that Respondent's "plan is to deduct these amounts evenly over the next **three** pay days for each employee starting with the September 12, 2014 payday" and to let him know if Dagle had "any questions or concerns." (Resp. Exh. 1, p. 1; Tr. 40, 192). Riess attached a spreadsheet reflecting each employee's earnings and the amount to be deducted over these three pay periods. The total amount to be deducted ranged from a low of $0 to a high of $166.94. (Resp. Exh. 1, pp. 2, 3; Tr. 192). Dagle did not respond to Riess until 4:14 p.m. on Friday September 5, 2014, when he sent Riess the following email: "The Union opposes Stericycle's unilateral decision to recoup unpaid health care deductions beginning September 8, 2014. Your recoupment decision is in violation of the Collective Bargaining Agreement and Stericycle's

[2] Although the Judge dismissed this allegation, Respondent has filed conditional exceptions to his findings that Respondent did not provide timely notice to the Union of the first deduction, that the Union did not waive its right to bargain over the first deduction, and that the second and third deductions constituted material and substantial changes in wages and benefits.

obligations under federal law." (Resp. Exh. 1, p. 5; Tr. 192). Riess replied to Dagle at 1:49 p.m. on Monday September 8, 2014, noting that the CBA obligated the employees to make the contributions and the Company was not precluded from catching up on deductions. Riess reiterated that he was "available to discuss." (Resp. Exh. 1, pp. 7-8; Tr. 192-193).

It was not until 11:04 a.m. on Tuesday, September 9, 2014. (Resp. Exh. 1, pp. 9-11) that Dagle asserted that any "recoupment schedule must be negotiated with the Union." However, "[a]s a precondition for bargaining, Stericycle must first rescind its decision to commence recoupment and forego any further action pending agreement." Only then would the Union agree to "negotiate on this matter on September 23, or September 29, 2014." Later that day, at 5:01 p.m., Riess responded by email, offering the following solution:

> All these defenses to the Company's actions aside, we are willing to bargain with the union over the timing of the catch-up deductions as announced in our September 3 letter to you and as you request in your communication today. Since we did not hear anything from you for days following that communication, the first payment on the schedule has already been processed in our payroll for this coming Friday. We will hold off on making any further deductions—notwithstanding our right to do so—until you and I have had a chance to further discuss.

(Resp. Exh. 1, pp. 12-13).

On September 10, 2014, Riess and Dagle met regarding a pending grievance. During this meeting they discussed the payroll deduction issue. Dagle stated that the issue needed to be negotiated, but that the Company would have to restore the first deduction and that the Union would negotiate only if the "status quo" was restored. Riess explained that the payroll had already been processed for September 12 and could not be reversed, but that the Company would be willing to discuss the next two scheduled deductions. (Tr. 193-194). On Thursday, September 11, 2014, at 2:56 p.m., Riess sent Dagle the following email:

> During our meeting yesterday, I explained that it was too late to reverse the upcoming deduction but offered to sit down and meet with you prior to taking any action on the others (without conceding our right to do so). Are you interested in meeting on these or not? I still have the same dates available. If I don't hear from you, we will simply proceed as planned. I don't need to remind you that payroll is processed a week in advance of the pay date.

(Resp. Exh. 1, p. 15).

Later that day at 5:00 p.m., Dagle responded by email, but did not address Riess's renewed offer to meet regarding the subsequent planned deductions. (Resp. Exh. 1, pp. 14-15). There were no further communications between Riess and Dagle on this issue. As employees are paid bi-weekly (Tr. 38), the final two deductions occurred on the September 26, 2014, and October 10, 2014 payrolls.

ISSUES

1. Whether Respondent violated § 8(a)(1) of the Act by maintaining at its Morgantown facility overly broad policies that could reasonably be read as unduly restricting employee section 7 rights? [Exception numbers 5, 6, 7, 8, 9, 10, 11, 12, 24, 26, and 27]

2. Whether a "nationwide" remedy is appropriate? [Exception numbers 2 and 25]

3. Whether Respondent violated §§ 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with relevant information? [Exception numbers 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, and 27]

3. Whether Respondent violated §§ 8(a)(5) and (1) of the Act by unilaterally issuing an employee handbook at its Morgantown facility? [Exception numbers 3, 4, 24, 26, and 27]

4. Whether the Judge properly, and consistent with the law and Respondent's due process rights, denied Respondent's motion to dismiss and restricted Respondent from presenting evidence on its Eighth Affirmative Defense? [Exception number 1]

5. Conditionally, whether certain findings and/or conclusions of the Judge regarding allegations dismissed by the Judge, are supported by record evidence and the law? [Exception numbers 28, 29, 30, and 31].

ARGUMENT

A. The Challenged Policies And Handbook Provisions Are Lawful.

The legal framework for evaluating the lawfulness of employer rules and policies is well settled. The basic "inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enf'd*, 203 F.3d 52 (D.C. Cir. 1999). "In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Lutheran Heritage Village – Livonia*, 343 NLRB 646, 646 (2004). Unless the rule or policy explicitly restricts section 7 activity, it will be deemed unlawful only if "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; (3) or the rule has been applied to restrict the exercise of Section 7 rights." *Id.* at 647. The Board "will not conclude that a reasonable employee would read the rule to apply to [protected] activity simply because the rule *could* be interpreted that way," as this "would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable." *Id.* (emphasis included).

Even if the rule or policy explicitly restricts, or is reasonably read to restrict, Section 7 activity, the Board is required to evaluate the employer's asserted business justification "[t]o strike a proper balance between the employees' rights and the Respondent's business justification." *Caesar's Palace*, 336 NLRB 271, 272 (2001). "The issue is whether the interests

of the Respondent's employees . . . outweighs the Respondent's asserted legitimate and substantial business justifications." *Id.* The Board must accommodate the respective rights of the parties "with as little destruction of one as is consistent with the maintenance of the other." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

Here, it is not contended that any of the rules or policies in issue were adopted in response to protected activity or applied to restrict protected activity. The Judge, however, found that certain rules and policies could be read to restrict Section 7 activity. Respondent excepts to these findings.

1. Harassment Complaints

The Morgantown handbook contains the following confidentiality language in a provision regarding "Retaliation":

> All complaints will be promptly investigated. *All parties involved in the investigation will keep complaints and the terms of their resolution confidential to the fullest extent practicable.*

(GC Exh. 22, p. 10). In the Judge's view, the confidentiality language could reasonably be read as prohibiting protected activity. (JD 27: 5-18). This conclusion is clearly erroneous.

First, the Judge's assertion that "[a]n employee could reasonably construe the restriction as prohibiting communications with Board agents or other governmental agencies about complaints related to the workplace or Section 7 activities" (JD 26:46-47; 27: 1-2) borders on the ludicrous. The cases cited by the Judge to support this conclusion are wholly inapposite. In *Kinder-Care Learning Centers*, 299 NLRB 1171, 1179 (1990), the policy in question explicitly required, under threat of discharge, that "the conditions of center facilities and the terms and conditions of employment are not to be discussed by you with parents and should always remain the responsibility of the Center Director" and that "[i]f you have a work related complaint,

concern, or problem of any kind, it is essential that you bring it to the attention of the Center Director immediately or use the company problem solving procedure set forth in this handbook." In *DirectTV U.S. DirectTV Holdings, LLC,* 359 NLRB No. 54 (2013), the policy provided: "If law enforcement wants to interview or obtain information regarding a DIRECTV employee, whether in person or by telephone/email, the employee should contact the security department in El Segundo, Calif., who will handle contact with law enforcement agencies and any needed coordination with DIRECTV departments." Neither of these cases shed any light on the policy at issue here, which says nothing about government complaints, does not apply to complaints about working conditions or terms of employment, and contains no threat of discipline.

While the section entitled "Retaliation" is separate from the section entitled "Harassment," the two are interrelated and the "Retaliation" provision is expressly directed at employees "who have been the victim of harassment or retaliation of any kind." There is nothing in the provision that would cause an employee to interpret the confidentiality language as extending to any type of complaint other than one of harassment or retaliation. That the policy is not limited to "sexual" harassment complaints does not alter the analysis, as federal and state law prohibit multiple types of discrimination and retaliation, including discrimination and retaliation based on race, national origin, disability, military service, etc. The policy clearly does not cover complaints regarding wages, benefits, safety, or general working conditions.

The clear intent of the policy is to protect employees from all forms of harassment and to provide an effective mechanism by which employees who believe they have been subjected to harassment will feel comfortable to report such conduct so that an investigation can be conducted, appropriate remedial action taken, and appropriate protective measures established. Any employee reading the policy would readily understand this lawful purpose, which is further

reinforced by the fact that the challenged language appears under the highlighted (bold font) heading: **What action should you take if you feel you have been a victim of harassment or retaliation?** Many employees may be reluctant to report incidents of harassment if their complaints are subject to being revealed throughout the workforce. They may fear embarrassment or possible retaliation by the alleged perpetrator. Thus, the policy even provides for anonymous complaints.

The policy does not broadly prohibit employees from discussing issues of harassment or retaliation. Thus, it is limited to internal complaints in which the victim has requested an investigation by Respondent. The policy extends only to the "parties" to the investigation; i.e., the victim, the alleged perpetrator, witnesses who may be interviewed, and the managers and supervisors involved in the investigation. The policy imposes no discipline if confidentiality is not maintained and pledges confidentiality only "to the fullest extent practicable." The Judge suggests that the phrase "fullest extent practicable" is imprecise and thus creates further uncertainty in an employee's mind. (JD 27: 9-12). The more natural reading, however, is that complete confidentiality cannot be guaranteed, and that circumstances may arise in which the Company finds it necessary to reveal aspects of the investigation. Finally, while there may be circumstances in which an employee's discussion of a harassment complaint or investigation could be deemed to be protected by Section 7, there are numerous other circumstances in which such discussion would be neither concerted nor protected. For all of these reasons, the challenged language cannot reasonably be read as chilling employee Section 7 rights.

Even if the language could be read to restrict Section 7 rights, Respondent has a substantial and compelling business interest that outweighs whatever limited restriction on Section 7 rights might occur by the mere maintenance of the challenged language in the policy.

The Board has recognized that "employers have a legitimate right to adopt prophylactic rules banning [harassment] because employers are subject to civil liability under federal and state law should they fail to maintain 'a workplace free of racial, sexual, and other harassment.'" *Lutheran, supra,* 343 NLRB at 647 (quoting *Adtranz ABB Daimler-Benz Transportation, N.A., Inc.,* 253 F.3d 19, 27 (D.C. Cir. 2001))."Title VII [of the Civil Rights Act of 1964] is designed to encourage the creation of antiharassment policies and effective grievance mechanisms." *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 764 (1998). Where there is no tangible adverse employment action, an employer may assert an affirmative defense if it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and the "employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* at 765. Evidence that the "employer had promulgated an antiharassment policy with complaint procedure" is pertinent to establishing this affirmative defense. *Id.; Debord v. Mercy Health System of Kansas, Inc.*, 737 F.3d 642, 653-654 (10th Cir. 2013); *Barrett v. Applied Radiant Energy Corp.,* 240 F.3d 262, 266 (4th Cir. 2001).

One of the elements of an effective harassment policy is the inclusion of a confidentiality provision. "By providing clear direction as to how to report sexual harassment and by including a confidentiality and anti-retaliation provision, [the employer's] policy was reasonably calculated to prevent and promptly correct any sexually harassing behavior." *Id.; see Brink v. McDonald,* 116 F. Supp. 3d 696, 700 (E.D. Va. 2015). "Equal Employment Opportunity Commission guidelines suggest that information about sexual harassment allegations, as well as records related to investigations of those allegations, should be kept confidential," and "the obligation to comply with such guidelines may often constitute a legitimate business justification for requiring confidentiality in the context of a particular investigation or particular types of investigations."

Hyundai America Shipping Agency, Inc. v. NLRB, 805 F.3d 309, 314 (D.C. Cir. 2015). Indeed, the federal courts have upheld the right of employers to discharge employees who violate the confidentiality provisions of a bona fide harassment policy. *Newsday, Inc. v. Long Island Typographical Union 915, CWA,* 915 F.2d 840, 845 (2d Cir. 1990). Some federal courts have even required, as part of injunctive relief, that employers include confidentiality provisions in their harassment policies. *EEOC v. New Breed Logistics, Inc.*, 2013 WL 12043550 (W.D. TN 2013); *Arizona Department of Law v. ASARCO, LLC,* 798 F.Supp. 2d 1023, 1059 (D. Arizona 2011), *aff'd,* 773 F.3d 1050 (9th Cir. 2014).

Respondent clearly has a substantial and compelling business justification for including a confidentiality provision in its harassment policy. Further, the confidentiality provision adopted by Respondent is narrowly tailored and Respondent's business justification outweighs the limited impact, if any, that this provision arguably might have on the exercise of Section 7 rights. Thus, the confidentiality provision is limited to harassment investigations, where the need for confidentiality is particularly acute. It is unlike the broad confidentiality provision found unlawful by the Board and the court in *Hyundai America, supra,* where the provision banned "discussions of *all* investigations, including ones unlikely to present these concerns [regarding compliance with federal and state law]." 805 F.3d at 314. Rather, it is more akin to *Caesar's Palace, supra,* where the employer lawfully "imposed a confidentiality rule during an investigation of alleged illegal drug activity in the work place . . . to ensure that witnesses were not put in danger, that evidence was not destroyed, and that testimony was not fabricated." 336 NLRB at 272. Although the confidentiality provision here is not limited to a single specific investigation as in *Caesar's Palace,* it is limited to "particular types of investigations." *Hyundai America,* 805 F.3d at 314. Because employers can protect themselves from hostile environment

harassment claims only by adopting and disseminating an actual written harassment policy that covers all harassment investigations, it would be impossible to impose such provisions on a case-by-case basis. The confidentiality language adopted by Respondent is as narrow as it can be without being totally ineffective. It does not impose a requirement of "strict" confidentiality," but only "to the fullest extent practicable," and no disciplinary penalty is stated if an employee does not maintain confidentiality. Respondent requests that the Board dismiss this allegation.

2. Personal Conduct Policy

The Judge found unlawful the following provisions of the Personal Conduct policy contained in the Morgantown handbook (JD 25: 8-19):

> *In order to protect everyone's rights and safety, it is the Company's policy to implement certain rules and regulations regarding your behavior as a team member. Conduct that maliciously harms or intends to harm the business reputation of Stericycle will not be tolerated. You are expected to conduct yourself and behave in a manner conducive to efficient operations. Failure to conduct yourself in an appropriate manner can lead to corrective action up to and including termination.*
>
> ***The following are some examples of infractions, which could be grounds for corrective action up to and including termination, however this list is not all-inclusive.***
>
> . . . .
>
> *Engaging in behavior which is harmful to Stericycle's reputation*
>
> . . . .

The Judge reached this conclusion, however, only by viewing this language in total isolation. With respect to the introductory paragraph, the first, third, and fourth sentences cannot be read as prohibiting Section 7 activity. These sentences merely note the general need for rules of conduct and for employees to conduct themselves in a manner consistent with efficient operations. The second sentence—Conduct that maliciously harms or intends to harm the

business reputation of Stericycle will not be tolerated—is also perfectly lawful. Although Section 7 activity may sometimes harm the reputation of an employer, the Board and courts have never held that employees have a right to maliciously or intentionally harm their employer's business or reputation. *NLRB v. Electrical Workers Local 1229 (Jefferson Standard*), 346 U.S. 464, 472 (1953); *Valley Hospital Medical Center, Inc.*, 351 NLRB 1250, 1252-53 (2007), *enf'd sub nom. Nevada Service Employees Union v. NLRB,* 358 Fed Appx. 783 (9th Cir. 2009); *Stanley Furniture Co.,* 271 NLRB 702, 703-704 (1984). As the introductory paragraph is limited to malicious and intentional conduct, it is clearly lawful.

What follows are 17 rules of conduct, only one of which the Judge found to be unlawful: Engaging in behavior which is harmful to Stericycle's reputation. While this rule, viewed in isolation, might lack the specificity typically required, the Board has declined to read handbook provisions out of context. Here, the rule in question must be considered both in the context of the introductory paragraph and the rules that surround it. Because the introductory paragraph proscribes only conduct that maliciously or intentionally harms Respondent's reputation, it seems likely that an employee would interpret the rule in question as merely a short-hand restatement of the general policy. But even without this introductory language, the challenged rule is included in the middle of sixteen other rules that clearly do not encompass protected activity and equally clearly do proscribe conduct that employees reasonably understand to be legitimately not in the interest of Respondent. The immediately preceding rule prohibits violence and the immediately following rule prohibits falsification of company documents. In this context, the rule is reasonably interpreted as proscribing clearly harmful (and unprotected) conduct such as moral turpitude, illegal acts, unethical behavior, and misuse of medical waste received from medical facilities. According to the Judge, however, "[t]he fact that the policy is buried among

16 other rules relating to unprotected conduct is immaterial." (JD 25: 15-18). Respondent contends that this statement is inconsistent with the Board's professed position that it reads rules reasonably and in context. Respondent requests that this allegation be dismissed.

3. Conflicts of Interest

The Morgantown handbook contains the following language in a Conflict of Interest policy:

> *Stericycle will not retain a team member who directly or indirectly engages in the following:*
>
> -- *An activity that constitutes a conflict of interest or adversely reflects upon the integrity of the Company or its management.*

(GC Exh. 22, p. 33).

The Judge found the italicized language to be overly broad and unlawful. (JD 25: 38-48; 26: 1-2). But, as with regard to the Personal Conduct policy, this language must be read in context and not in isolation. This is a "Conflict of Interest" policy, which employees reasonably understand to deal with their financial and business activities. A *conflict of interest* would exist if the employee accepted part-time work with, or assisted, a competitor of Respondent, or used his association with Respondent to further his personal interests. The Judge's suggestion that a "conflict of interest" might be found if employees chose to engage in a union boycott, conduct a protest in front of the Company, or solicit union support on non-work time (JD 25: 29-33) represents the type of strained and fantastical reading that the Board purports to eschew. Similarly, prohibiting conduct that "adversely reflects upon the integrity of the Company or its management" would obviously include engaging in unethical business behavior, or flagrantly and publicly defaming Respondent or a customer. Employees would not reasonably construe this policy to prevent or restrict genuine union or concerted activity. Cases such as *Pacific Beach*

Hotel (HTH), 356 NLRB 1397, 1398, 1421 (2011), cited by the Judge (JD 25: 30-36) are wholly inapposite. In that case, the policy provided: "Any advice by any Pacific Beach Corporation employees, solicited or unsolicited, for the intended purpose of discouraging any potential or actual customer from utilizing services of Pacific Beach Corporation to aid another organization will be considered as an act of serious disloyalty and subject the employee to termination." Insofar as the Judge's analysis comports with the Board's recent trend of decisions, Respondent requests that the Board change its course. Analysis like this is a colossal waste of government resources and turns the Board into a Personnel Policy police force.

The language in Respondent's policy is not materially different from the rules found lawful in *Lafayette Park, supra.* There, Rule 6 prohibited "engaging in conduct that does not support the Lafayette Park Hotel's goals and objectives." Rule 31 prohibited improper conduct "which affects the employee's relationship with the job, fellow employees, supervisors, or the hotel's reputation or good will in the community. The Board found both rules lawful. 326 NLRB at 824-825. Only the most tortured reading of Respondent's Conflict of Interest policy would lead one to believe that engaging in *protected* union or concerted activity is prohibited. Respondent requests that this allegation be dismissed.

4. Camera & Video Use Policy

The Morgantown facility also maintained a Camera & Video Use policy. The Judge found the following provisions to be overly broad and unlawful:

> *3.1 Team members are prohibited from taking pictures with a personal or company issued camera or cell phone camera of any Stericycle property, operation, or equipment without the permission of their supervisor/manager.*
>
> 4.1 *Team members are prohibited from taking video or audio recordings with a personal or company camera, camcorder, or other device of any Stericycle property, operation, or equipment without the permission of their supervisor/manager.*

The Judge relied upon the Board's recent decisions in *T-Mobile USA,* 363 NLRB No. 171 (2016); *Whole Foods Market, Inc.*, 363 NLRB No. 87 (2015); and *Rio All-Suites Hotel*, 362 NLRB No. 190 (2015). (JD 28: 20-45; 29: 1-20). Respondent disagrees with the Board's analysis in those cases, but in any event, each of these decisions is distinguishable in material respects and not dispositive of Respondent's policy. In *T-Mobile*, the employer's policy prohibited employees "from recording people or confidential information using cameras, camera phones/devices, or recording devices (audio or video) in the workplace," absent "permission from an employee's Manager, HR Business Partner, or the Legal Department." Further, "[i]f an exception is granted, employees may not take a picture, audiotape, or videotape others in the workplace without the prior notification of all participants." Similarly, in *Whole Foods*, the policy prohibited the recording of "conversations, phone calls, images or company meetings" without approval from management, as well as all parties to the conversation. The employer representative testified that the policy applied everywhere on the property and at all times and that it applied even if the employee was engaged in protected activity. The Board characterized the rules as "unqualifiedly prohibit[ing] all workplace recording." In *Rio All-Suites*, the policy prohibited all picture taking and recording on Company "property" without management approval. The Board found each of these policies overly broad and not sufficiently tailored to protect any legitimate business interests of the employer.

In contrast to these three cases, Respondent's policy does not unqualifiedly prohibit all picture taking or recording on Company property.[3] Nor does it prohibit taking pictures of

[3] The Judge's finding/conclusion that "[a] reasonable interpretation of the policy conveys the sense that the policy totally prohibits the use of such devices at any time on company property without permission of a supervisor or manager" (JD 29: 7-10) wholly ignores both the stated purpose of the policy and the limited nature of the prohibition.

"people" or recording "conversations" or "meetings." Respondent's policy only prohibits taking pictures of "any Stericycle property, operation, or equipment." The limited scope of the prohibition is also demonstrated by the stated purpose of the policy: "To ensure that proprietary information, treatment processes, equipment, transfer station operations and warehouse operations remain under the control of Stericycle, Inc." Thus, employees would not reasonably interpret this policy as prohibiting protected activity. In the three cases cited above, the Board stated that "protected conduct may include, for example, recording images of protected picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment, documenting inconsistent application of employer rules, or recording evidence to preserve it for later use in administrative or judicial forums in employment-related actions." Respondent's policy clearly does not prohibit the recording of protected picketing, workplace discussions, inconsistent application of rules, or possible evidence in a legal proceeding. The only one of these examples that the policy, on its face, might arguably preclude is "documenting unsafe workplace equipment." Yet, it is clear from the face of the policy that its intent is not aimed at preventing such documentation, but at protecting Respondent's proprietary interests.

Whatever limited impact Respondent's policy has on the right of employees to engage in protected activity is far outweighed by the substantial business justification set forth in the policy. Respondent's equipment and processes are highly proprietary and are unique in the industry. Taking pictures of such equipment and processes would compromise and undermine Respondent's proprietary interests, and could cause Respondent substantial economic damage if competitors were to obtain pictures. This justification is far more compelling than the generalized interest in open communications cited by the employers in the three cases cited

above. The Board, however, did not reject these generalized interests as being "without merit," but as being "based on relatively narrow circumstances, such as annual town hall meetings and termination-appeal peer panels." Here, Respondent's interests are not based on narrow circumstances and its policy is narrowly drawn to protect those interests. In this regard, it is akin to the justification of protecting patient privacy found by the Board in *Flagstaff Medical Center,* 357 NLRB 659 (2011), *enf'd pertinent part,* 715 F.3d 928 (D.C. Cir. 2013) as sufficient to justify a ban on recording images in a hospital.

Further, Respondent's policy even permits pictures to be taken of equipment with permission. While employees may not be required to obtain permission from their employer in order to engage in Section 7 activities, it is inaccurate to say that a policy is inherently unlawful if it contains a provision requiring permission. For example, the Board has held that a rule prohibiting employees from leaving their work station without permission is lawful, even though there may be circumstances in which employees have a Section 7 right to leave their work station. *Heartland Catfish Co.,* 358 NLRB 1117 (2012); *2 Sisters Food Group, Inc.,* 357 NLRB 1816, 1817-18 (2011). Similarly, to Respondent's knowledge, the Board has never held that a policy requiring employees, under threat of discipline, to work overtime, unless excused by their supervisor, to be unlawful even though there may be circumstances in which employees have a Section 7 right to refuse to work overtime. It bears repeating that "[w]here, as here, the rule does not refer to Section 7 activity, [the Board] will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way." *Lutheran, supra,* 343 NLRB at 647. Respondent requests that this allegation be dismissed.

Finally, as noted above, Respondent contends that the Board's analysis as set forth in the *T-Mobile, Whole Foods, Rio All-Suites* trilogy is misguided insofar as it seems to recognize a

section 7 right not merely to take pictures when the opportunity presents itself, but to possess and use cameras and other recording devices on an employer's premises irrespective of any countervailing policies implemented by their employer. A no-camera/no-pictures policy that was adopted in response to protected activity or that was discriminatorily applied to restrict section 7 activity would certainly violate the Act, but as then-Member Johnson observed (n. 12) in his dissent in *Rio-All Suites*, "there is no Sec. 7 right to *possession* of a camera or other recording device by employees on an employer's property." To be sure, one must possess a recording device in order to be able to use it, but with the exception of actual Section 7 *communications* (literature, pins, buttons, caps, etc.), which inherently constitute protected activity, the Board had never previously, to Respondent's knowledge, held that employees have a statutory right to possess or use any specific personal property while *inside* their employer's work facility simply because that property might *facilitate* Section 7 activity. There are many devices that conceivably might aid employees in engaging in Section 7 activities: cameras, cell phones, DVD players, laptop computers, PA systems, megaphones, portable booths, card tables, tape recorders, binoculars, portable printers, bulletin boards, facsimile machines, to name some that come to mind. If an employer permits employees to possess and use such devices inside its facility, it may not discriminate based on Section 7 activity, but employees do not have a statutory right to possess or use these devices inside their employer's facility, and an employer may lawfully restrict or prohibit the possession and use of such devices.

This is not a novel proposition, as the Board has specifically held that employees have no statutory right to utilize an employer's bulletin boards, televisions, VCRs, and other facilities to engage in section 7 activity. *Mid-Mountain Foods,* 332 NLRB 229 (2000), *enf'd,* 269 F.3d 1075 (D.C. Cir. 2001); *Union Carbide Corp.*, 259 NLRB 974, 980 (1981), *enf'd in pert. part,* 714 F.2d

657 (6th Cir. 1983). The one exception, of recent origin, is *Purple Communications, Inc.*, 361 NLRB No. 126 (2014), where the Board overruled prior precedent, and held:

> [W]e will presume that employees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in Section 7-protected communications on nonworking time. An employer may rebut the presumption by demonstrating that special circumstances necessary to maintain production or discipline justify restricting its employees' rights.

The Board expressly limited its decision to use of an employer's email system and expressly chose not to address other types of electronic communications systems. And the right it recognized "applies only to employees who have been granted access to the employer's email system in the course of their work and does not require employers to provide access."

Respondent requests that the Board revisit and discard the analysis adopted in the *T-Mobile, Whole Foods, Rio All-Suites* trilogy insofar as it recognizes any statutory right of employees to possess or use personal cell phones, cameras, and other recording devices on their employer's premises. The proper analysis is this: If an employer has no applicable policy, employees may possess and use such devices so long as they do not violate other established rules in doing so (e,g., leaving work station without permission, ignoring safety rules, disrupting work.) If an employer maintains a facially neutral, lawfully adopted, policy, it may apply that policy to restrict or prohibit the possession or use of personal recording devices so long as it does not do so in a manner that discriminates against protected activity.

B. A Nationwide Posting Remedy Is Inappropriate.

In the event that it is found that one or more of the challenged policies are overly broad and violative of Section 8(a)(1), which Respondent denies, the record fails to support the nationwide posting remedy ordered by the Judge. (JD 38: 18-27). A nationwide posting remedy is only appropriate when the record establishes that the unlawful rules or policies are maintained

or in effect at all of the employer's facilities nationwide. *E.g., Mastec Advance Technologies,* 357 NLRB 103 (2011), *enf'd sub nom. DIRECTV v. NLRB,* 837 F.3d 25 (D.C. Cir. 2016); *Guardsmark, LLC,* 344 NLRB 809, 812 (2005). On the other hand, when "the record does not make clear whether the unlawful provisions at issue are contained in the handbooks in use at other sites . . . a nationwide order is not appropriate." *Rio All-Suites Hotel & Casino,* 362 NLRB No. 190, n. 15 (2015); *accord, Hyundai America Shipping Agency, Inc.,* 357 NLRB 860, 879 n. 19 (2011). Such is the case here.

Initially, the complaint alleges only that the handbook was "distributed . . . to employees in the Morgantown Unit" and that Respondent "maintained the rules in effect for employees in the Morgantown Unit." (¶ 6(a)). With respect to the Camera & Video Use policy, the complaint alleges only that this policy was "maintained in effect for employees in the Morgantown unit." (¶ 6(b)). These allegations are insufficient to place the nationwide application of these rules and policies in issue. Respondent did not attempt to litigate this issue, and it is a denial of due process to impose this remedy where the issue was not alleged or litigated.

Second, the sole evidence presented by the General Counsel regarding the geographic scope of the handbook was a training roster sheet reflecting dissemination at Morgantown. (GC Exh. 32). It is true that the handbook in question states that it is for "U.S. Based Team Members," but this is insufficient to establish actual dissemination or maintenance at other facilities. The development of this handbook occurred as a result of an information request at Morgantown for the 2014 handbook and Respondent's discovery that no handbook had been distributed or maintained at Morgantown or Southampton for several years. When the 2015 handbook was provided to Dagle, he was advised of this fact and told that the new handbook was being distributed at these two locations. (GC Exh. 21). In fact, however, it is undisputed that the

new handbook was not distributed at Southampton. (Tr. 110). As there is no evidence that the new handbook was distributed or maintained beyond Morgantown, any posting requirement must be limited to Morgantown. Similarly, although the separate Camera & Video Use policy purports to be a corporate policy (GC Exh. 30), the policy is dated January 1, 2012, and it concededly was not implemented or maintained at Southampton. (Tr. 87). The only evidence of actual dissemination or maintenance within the 10(b) period is that Safety Manager Maggiaro trained the Morgantown employees on this policy in 2014. (Tr. 230). Respondent requests that the nationwide posting remedy be rejected.

C. Respondent Did Not Unlawfully Refuse To Furnish Information.

As a general proposition, an employer has a duty, upon request, to furnish the union with relevant information regarding the bargaining unit. Where the information does not relate to or concern bargaining unit employees, it is not presumptively relevant, and "a specific need for it must be established." *F.A. Bartlett Tree Expert Co.,* 316 NLRB 1312, 1313 (1995). The burden of establishing this special need is on the Union. Merely asserting that information "is necessary to make a reasonable [contract] proposal is nothing more than another way of saying that it is needed 'to bargain intelligently' and this general claim is simply insufficient to establish relevance." *F.A. Bartlett,* 316 NLRB at 1313. While these general principles are helpful, "[t]he duty to supply information under § 8(a)(5) turns upon 'the circumstances of the particular case,' . . . and much the same may be said for the type of disclosure that will satisfy that duty." *Detroit Edison Co. v. NLRB,* 440 U.S. 301, 314-315 (1979) (citations omitted). Thus, there is no obligation "to furnish such information in the exact form requested by the representative. It is sufficient if the information is made available in a manner not so burdensome or time-consuming as to impede the process of bargaining." *Cincinnati Steel Castings Co.,* 86 NLRB 592, 593

(1949). The Supreme Court has rejected "the proposition that union interests in arguably relevant information must always predominate over all other interests, however, legitimate." *Detroit Edison,* 440 U.S. at 318. When an employer has legitimate concerns about a union request for information, the employer must seek "to accommodate the union's request for relevant information consistent with other interests rightfully to be protected," and "[h]aving made a reasonable accommodation the employer avoids a Board finding that it violated § 8(a)(5)." *United States Testing Co. v. NLRB,* 160 F.3d 14, 20-21 (D.C. Cir. 1999). The union has a good faith obligation to participate in the process with the goal of reaching a reasonable accommodation. If the union fails to engage in such an interactive process, the employer's good faith cannot be tested, any charge alleging a refusal to furnish information will be deemed premature, and no violation will be found. If the union does engage in good faith negotiation over an accommodation, but no agreement can be reached, the Board may determine the legitimacy, priority, and appropriate accommodation of the parties' respective interests. *Emeryville Research Center, Shell Development Co. v. NLRB,* 441 F.2d 880, 883-886 (9th Cir. 1971); *Yeshiva University,* 315 NLRB 1245, 1248 (1994).

1. Article 23.3 Requests

The Judge found that Respondent unlawfully failed to furnish the Union with "internal communications and meeting and bargaining notes requested by the Union on September 5 and 18, 2014, relating to the Company's implementation of Article 23.3." (JD 32: 42-44). Respondent initially declined to furnish its own internal communications and internal meeting notes on the ground that the Union was effectively seeking pre-arbitration discovery. As a rule, "there is no general right to pretrial discovery in arbitration proceedings." *California Nurses Assoc.*, 326 NLRB 1362, 1362 (1998). The Board has distinguished between requests made prior

to any demand for arbitration and those made after such a demand. *Hawaii Tribune-Herald,* 356 NLRB 661, 684 (2011), *enf'd sub nom. Stephens Media, LLC v. NLRB,* 677 F.3d 1241 (D.C. Cir. 2012); *Ormet Aluminum Mill Products Corp.,* 335 NLRB 788, 789 (2001). Although there is no per se rule that relevant information cannot be requested after a demand for arbitration, the Board does scrutinize such requests to determine if they are in the nature of a discovery request, rather than a bona fide request for information. *Oncor Electric Delivery Co.,* 364 NLRB No. 58 (2016).

Here, the Union's request was first made after arbitration had been demanded. Thus, Respondent was not without justification in asserting that the Union's request appeared to be a request for pre-arbitration discovery. Notably, the Union did not challenge this assertion, and the issue did not arise again until the Union issued its subpoena in August 2015. At that time, with an arbitration hearing scheduled for September 10, 2015, Respondent's counsel reevaluated the Union's request and concluded that the Union was entitled to certain "[d]ocuments concerning or relating to Stericycle's implementation of Article 23.3 of the November 1, 2013 to October 31, 2016 collective bargaining agreement," Thus, on September 4, 2015, Respondent furnished 38 pages of documents directly related to the implementation of Article 23.3. (Resp. Exh. 7, pp. 7-40). The Union never asserted that this response was inadequate in any way. In these circumstances, it is apparent that the Union's request for "internal communications and meeting notes" has been fully satisfied. The Judge erred in finding a violation regarding these items.

Respondent declined to provide its bargaining notes and other bargaining documents on grounds of privilege, relevance, and confidentiality. The Union subpoenaed these notes for the arbitration hearing, but the arbitrator revoked this part of the Union's subpoena. (Tr. 311). While the Board may not be bound by the arbitrator's ruling on the Union's subpoena, his ruling does inform the Board. After all, the clear purpose of the Union's request was to utilize the bargaining

documents at the arbitration. Thus, even if the Board were to determine that the Union was entitled to these documents, such ruling would not alter the fact that the arbitrator declined to allow such documents to be used during the arbitration.

Further, the Board itself has recognized that a broad subpoena seeking to require a party to open its bargaining files "would be inconsistent with and subversive of the very essence of collective bargaining." *Berbiglia, Inc.,* 233 NLRB 1476, 1495 (1977). "If collective bargaining is to work, the parties must be able to formulate their positions and devise their strategies without fear of exposure." *Patrick Cudahy, Inc.,* 288 NLRB 968, 971 (1988) (quoting *Berbiglia* at 1495). In *Boise Cascade Corp.,* 279 NLRB 422, 432 (1986), the Board found that the employer lawfully refused to furnish the Union with certain bargaining documents related to a maintenance improvement program:

> A proper bargaining relationship between the parties mandates that Respondent be able to confidentially evaluate possible interpretations of the existing labor agreement and that it be able to plan in confidence a strategy for altering or changing its maintenance improvement program. I recognize that complete disclosure might help an arbitrator to reach a more just result, but at the same time it might well have a tendency to frustrate the overall purpose of collective bargaining between the parties. On this particular point, a balancing of the parties' interests must be weighed in favor of Respondent being allowed to withhold from the Union its historical overview of negotiations with the Union and its future negotiating strategy.

Id.

The Union's information request is sweeping in its scope: All documents, including bargaining notes, "showing, the dates of each session, the names of those present, the start and end time of sessions and breaks, sidebar discussions or other communications between sessions, and communications concerning bargaining before or after sessions whether in person, writing or telephone." Much of this information was wholly irrelevant or already known to the Union, and the rest delved into Respondent's bargaining strategies and internal interpretations of proposals.

In *Champ Corp.*, 291 NLRB 803, 817 (1988), *enf'd*, 933 F.2d 688 (9th Cir. 1991), the ALJ revoked a similarly broad subpoena seeking "[a]ny and all diaries, notes, memoranda, transcripts, records, or other writings, describing or recording collective bargaining negotiation sessions between [the Employer and the Union.]" The ALJ explained: "Finally, it is concluded that failure to revoke the subpoena, insofar as it may be found relevant, would do unwarranted injury to the process of collective bargaining." *Id. See* David I. Goldman, "Union Discovery Privileges," 17 *Labor Law* 241 (2001). Respondent requests that these allegations be dismissed.

2. Article 22.3 Requests

The Judge found that Respondent unlawfully refused to furnish the following documents: (a) internal communications regarding Respondent's decision to make "catch-up" medical premium deductions over three pay periods, (b) internal communications regarding Respondent's implementation of Article 22.3, and (3) Respondent's bargaining notes regarding the negotiation of Article 22.3. (JD 30: 1-33). Respondent denied these requests on grounds of relevance and privilege. Initially, it is clear that on November 19, 2014, after reaching a confidentiality agreement with the Union, Respondent did furnish the Union with 41 pages of internal communications regarding Respondent's efforts to implement Article 22.3. (Resp. Exh. 9). Thus, this aspect of the Union's request has been fully satisfied, and the Judge erred in finding a violation.

Regarding the Union's request for Respondent's internal communications regarding its "decision" to recoup the premiums over three pay periods and Respondent's bargaining notes regarding Article 22.3, it is difficult to see what relevance these documents would have to any potential grievance by the Union. The contractual issue was whether or not Respondent had a right to make the catch-up deductions over three pay periods (or some other time period).

Respondent's internal communications regarding the manner in which it chose to proceed would not shed light on whether it violated Article 22.3. Similarly, Respondent's bargaining notes would be of little value given that the issue between the parties arose unexpectedly *after* the parties reached agreement when Respondent ran into problems in implementing the deductions. Further, as explained above, there is a generally recognized privilege which protects a party's internal communications and its bargaining notes from disclosure, as such disclosure would be inimical to the collective bargaining process. For all of these reasons, Respondent requests that these allegations be dismissed.

3. Ebola "Video"

The Judge found that Respondent unlawfully refused to furnish the Union with its Ebola presentation to employees. (JD 33: 1-34). Respondent requests that this finding be rejected by the Board. Although employee training frequently "is a mandatory subject of bargaining," it is not inherently so. Rather, it depends upon the nature of the training and its impact on terms and conditions of employment. The case cited by the Judge, *Barstow Community Hospital,* 361 NLRB No. 34, slip op. at 2 (2014), *enf. den. on other grounds,* 820 F.3d 440 (D.C. Cir. 2016), concerned an information request made during contract negotiations regarding certification training implemented by the employer. The training specifically related to terms and conditions of employment and arguably impacted the right of nurses to obtain off-site certification. Further, the employer placed a cap on the number of hours for which employees would be paid. In this context, the Board stated that "Employee training and remuneration for time spent in required training relate to employees' wages, hours, and other terms and conditions of employment, and therefore constitute mandatory subjects of collective bargaining." Nothing in the *Barstow*

decision purports to hold that all types of training offered by an employer are always mandatory subjects of bargaining.

Here, there was no issue of pay, as the presentation was made on work time. Further, the presentation was wholly irrelevant to the Union's representational obligations. While the standard of relevance is broad, it is not unbounded. As set forth in the Morgantown CBA, the employees represented by the Union are regulated medical waste (RMW) workers. RMW is a specific category of waste separate and distinct from Class-A waste, which includes Ebola and other highly infectious types of waste. The undisputed evidence establishes that Respondent does not handle Ebola or other Class-A waste and has advised employees that they should not handle such waste if they come in contact with it. Class A waste is specially packaged and labelled. Because handling Ebola waste is not a term or condition of employment for any unit employee, the presentation did not relate to employee terms and conditions of employment. Thus, it was incumbent upon the Union to establish some special relevance. The Union failed to make any such showing.

Respondent's presentation was merely informational in nature and was not required by the CBA. The Union does not contend that Respondent violated any contractual obligation by giving the presentation, and no grievance was filed or even contemplated. Rather Dagle's contention is that having decided to make the presentation, the Respondent was obligated to provide the Union with a copy in order to allow its experts to assess the accuracy and adequacy of the presentation. This contention, if accepted, would stretch the standard of relevancy beyond its breaking point. While the Union undoubtedly has an interest in protecting the health and safety of unit employees, that interest does not extend to risks to which employees are not exposed. Further, inasmuch as Respondent, in making this presentation, was not purporting to

carry out any contractual obligation or to address any term or condition of employment, the Union had no statutory or contractual right to scrutinize or evaluate the adequacy of the presentation. Nothing would have prevented the Union from holding its own meeting with unit employees and providing its own information regarding Ebola. Indeed, if, as the Union contends, it is entitled to a copy of the Ebola presentation simply because Respondent showed it to employees, the same would hold true if the Union, in an effort to educate members, gave its own presentation on Ebola. Respondent would be entitled to a copy in order to assess the accuracy and adequacy of the information. There are many subjects that do not relate to terms and conditions of employment on which an employer (or a union) might wish to provide employees with general information, but merely choosing to provide such information does not create in the other party a right to critique the information provided.

Even if we assume that the presentation was "relevant" in some fashion to the Union's obligations as bargaining representative, Dagle had no right to dictate the format in which the information would be provided. "It is sufficient if the information is made available in a manner not so burdensome or time-consuming as to impede the process of bargaining." *Cincinnati Steel Castings Co.,* 86 NLRB 592, 593 (1949). When the information requested is complex and detailed, an offer to view may be found inadequate, and copies may be required so as not to impede collective bargaining. *American Telephone & Telegraph Vo.,* 250 NLRB 47 (1980), *enf'd sub nom. CWA, Local 1051 v. NLRB,* 644 F.2d 923 (1st Cir. 1981). However, where the information is less complex, an offer to view may suffice to satisfy the party's bargaining obligation. In *Cincinnati Steel,* the Board held that the employer did not violate the Act by providing *oral* information regarding employees rather than a *written* list as requested by the union. In *Abercrombie & Fitch Co.,* 206 NLRB 464, 466-467 (1973), the Board found no

violation when the employer allowed the union to look at an employee's "confession" and related documents, but declined to provide copies as the "information was not complicated." Similarly, in *Roadway Express, Inc.*, 275 NLRB 1107 (1985), the Board found no violation in the following circumstances:

> In this case, the information requested consists of a single-page letter which could be easily read and understood in a matter of minutes. It is undisputed that the Respondent offered to allow examination of the customer's letter. *It is also undisputed that the Union did not avail itself of this offer, or even ask to see the letter, but instead at all times demanded a photocopy.* Under these circumstances, the Respondent has demonstrated its willingness to supply the information to the Union in a reasonable manner.

Id. at 1107 (emphasis supplied).

The Judge's findings that the information contained in the presentation was "extremely complex" and that "the Company's offer to view the presentation only was unreasonable under the circumstances" (JD 33: 26-30) are clearly unsupported and contrary to the record as a whole. Here, we are dealing with a short power-point presentation that provided very general information regarding the topic of Ebola. (Tr. 227-230). At best, it was of marginal relevance, and there is no apparent reason why Dagle could not have accepted Respondent's offer, if only to determine whether in fact he needed a copy. Nothing in Respondent's offer required Dagle to waive any supplemental request for a copy of the presentation. Dagle's unwillingness to view the presentation first suggests that he was less interested in seeing the presentation than in standing on his asserted right to receive a copy of *anything* that Respondent showed to employees. Although Dagle offered to enter into some type of confidentiality agreement, such an agreement presupposed that Respondent's offer to view would be inadequate. Until Dagle actually viewed the video, he was not in a position to assess the adequacy of Respondent's offer. Thus, Respondent did not act unreasonably in requesting that Dagle view the video first, and because

Dagle chose not to pursue this opportunity, Respondent had no obligation to pursue Dagle's proposal for a confidentiality agreement. Respondent requests that this allegation be dismissed.

4. Vehicle Backing Program

Respondent's vehicle backing program has two components: (a) a power point presentation prepared by Respondent and (b) a copyrighted video prepared by J.J. Keller. On March 2, 2015, Respondent furnished the power point presentation and provided a website link at which the Union could purchase a copy of the video. Dagle never went to the website to even determine how much it would cost. While the length of time between the Union's initial request on November 24, 2014, and Respondent's March 2, 2015 letter might in the abstract seem unreasonable, delay cannot be measured simply in days. Rather, it turns on the purpose for which the information is sought and all of the surrounding circumstances. *Good Life Beverage Co.*, 312 NLRB 1060, 1062 n. 9 (1993). Here, Respondent furnished substantial information regarding the James Clay incident on November 25, 2014, only one day after the request was made. When they met on November 28, 2014, Schoennagle advised Dagle that he did not have a copy of the vehicle backing program and would need to inquire further. It appears that with the impending holiday season, both parties allowed the issue to lay dormant until late January 2015 when Dagle inquired again. At that time, Schoennagle told him that the program was proprietary and could not be provided, but offered to review it with him. Again, Dagle rejected this offer out of hand. However, after the Union filed a charge on January 30, 2015, alleging that Respondent was unlawfully refusing to furnish the vehicle backing program, Respondent responded as described above on March 2, 2015. The Union never actually filed a grievance over the discipline issued to Clay. The Judge's finding that the delay was "unreasonable" and "prevented the Union from representing Clay's interests when he was disciplined" (JD 34: 25-32) is unsupported by the

record. It is undisputed that Respondent lawfully refused to furnish the copyrighted video. While the delay in providing the power point presentation may be longer than desirable, Dagle rejected the offer to view the presentation, and the surrounding circumstances do not establish any harm to the bargaining process. Respondent requests that this allegation be dismissed.

5. Harassment Training Video

Although the harassment training provided to employees by Respondent is of relevance to the Union, the Union was not entitled to insist upon receiving a copy of the training. Respondent contends that its offer to allow Dagle to view the video was sufficient and that the Union arbitrarily and unreasonably refused to pursue this offer, thereby precluding any further testing of the Respondent's good faith. Here, the training video was short and very general in nature. It was shown, but not distributed, to employees. Respondent's offer for the Union to view the video was a reasonable means of providing the Union with knowledge of the nature of the training provided. The video was proprietary to Respondent, as it was prepared specifically for Respondent by an outside law firm. Providing a copy to the Union would have undermined any claim of proprietary interest by Respondent. Nothing in Respondent's offer precluded Dagle, after viewing the video, from requesting a copy again. Indeed, after viewing the video, Dagle would have been in a position to evaluate whether he truly needed a copy and to state the reasons why, and Respondent would have been in a position to respond appropriately. Although each case must be evaluated on its own facts, Respondent contends that as a general principle, an employer's offer to view documents, pictures, or videos imposes upon the union an obligation to pursue that option before insisting upon being provided an actual copy. This is consistent with the bi-lateral nature of bargaining. Dagle's categorical refusal to view any document or video and his rigid insistence upon receiving copies effectively precluded any further testing of

Respondent's good faith. *Times Publishing Co.*, 72 NLRB 676, 683 (1947) ("The test of good faith in bargaining that the Act requires of an employer is not a rigid but a fluctuating one, and is dependent upon how a reasonable man might be expected to react to the bargaining attitude displayed by those across the table.") Dagle's position clearly was arbitrary and unreasonable. Inasmuch as the test of good faith bargaining is a "fluctuating one," Dagle's arbitrariness precludes finding any bad faith on Respondent's part. Respondent requests that this allegation be dismissed.

6. 2014 Employee Handbook

Although Fox referenced an employee handbook in an email to Dagle, it turned out that no handbooks had been maintained or distributed in Morgantown for several years—a fact she clarified with the Union. This led Respondent to create a 2015 handbook, which it distributed to employees in late February 2015 and furnished to the Union on March 2, 2015. Respondent contends that the record contains no evidence that the "2014 handbook" was ever distributed or maintained at Morgantown within the § 10(b) period and in any event it was superseded by the 2015 handbook, rendering it irrelevant. 74Respondent requests that this allegation be dismissed.

D. Respondent Did Not Unilaterally Change Terms and Conditions of Employment By Distributing an Employee Handbook to Morgantown Employees.

The Judge found that by distributing an employee handbook to Morgantown employees that contained provisions inconsistent with the CBA, Respondent unilaterally changed terms and conditions of employment for these employees in violation of §§ 8(a)(5) and (1). (JD 22: 34-47; 23: 1-9). Respondent takes exception to this finding. Although Respondent distributed an employee handbook at the Morgantown facility that contained a number of policies and provisions that were inconsistent with the CBA, the record contains not a scintilla of evidence that Respondent actually changed any term or condition of employment or ever took the position

that the handbook trumped the CBA. Merely distributing a document that is inconsistent in certain respects with a collective bargaining agreement is insufficient to establish any actual unilateral change in violation of section 8(a)(5) of the Act, particularly when that document acknowledges on the first page that certain provisions may not apply to union employees covered by a collective bargaining agreement. Although it conceivably might be argued that the distribution of such a document constituted an unlawful "threat" to change terms of employment in violation of section 8(a)(1), no such violation was alleged in the complaint or litigated by the parties. Instead, the facts were pled and litigated solely as a violation of Respondent's bargaining obligations under § 8(a)(5). Respondent requests that this allegation be dismissed.

E. Respondent Should Have Been Permitted To Present Evidence On Its Eighth Affirmative Defense.

Respondent maintains, for the reasons set forth in its motions to dismiss, that the complaint should have been dismissed. Respondent hereby renews its June 29, 2016 Motion to Dismiss Second Consolidated Complaint, which was directed to the Board and referred to the ALJ for initial resolution. At the very least, the ALJ erred by not permitting Respondent to call witnesses who could testify regarding the precise nature of the Regional Director's conflicts. In opposing Respondent's motion to dismiss, the General Counsel contended that the Director's conflict was only "potential" and not "real." But there is no evidence that would support this contention since neither the Director nor the General Counsel has stated precisely why the Director recused himself in *this* case and not in other cases. If, for example, the Director had some type of personal or financial relationship, either through the Peggy Browning Fund or some other means, with either Local 628 or its legal counsel, the conflict would be more than "potential;" it would be real, material, and immediate. Respondent, however, was not allowed the opportunity to develop or present such evidence. Respondent contends that this was harmful

error. The case should be remanded to the ALJ with a direction to reopen the record for the parties to present relevant evidence regarding the nature of the Regional Director's conflict.

CONDITIONAL EXCEPTIONS

A. Respondent Did Not Present The Union With A Fait Accompli Regarding The First Deduction.

Respondent agrees with the Judge's dismissal of the allegation that Respondent unlawfully recouped employee health care premiums over three consecutive paydays. (JD 22: 9-15). However, in the event that the General Counsel or the Charging Party files exceptions to this dismissal, the Judge's finding that Respondent failed to provide the Union with timely notice of the first planned deduction is directly contrary to the credited evidence. (JD 21: 1-6).

It is well established that "an employer's obligation, prior to making a change in the terms and conditions of employment, is to give notice of its planned change and afford a reasonable opportunity for bargaining. If an employer meets its obligation and the union fails to request bargaining, the union will have waived its right to bargain over the matter in question." *Associated Milk Producers, Inc.*, 300 NLRB 561, 563 (1990). "[T]he notice must be given sufficiently in advance of actual implementation of the change to allow a reasonable opportunity to bargain." *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), *enf'd*, 722 F.2d 1120 (3d Cir. 1983). "The Board has on occasion found as little as 2 days' notice adequate; it has frequently found notice ranging from 4 to 8 days sufficient." *Jim Walter Resources, Inc.*, 289 NLRB 1441, 1442 (1988). Once timely notice is provided, "the union must promptly request bargaining to avoid a waiver, and merely protesting the impending change is not sufficient." *Ciba-Geigy*, at 1017.

Here, Riess notified Dagle of Respondent's recoupment plan on Wednesday, September 3, 2014, and provided him with a detailed spreadsheet reflecting the amounts to be deducted.

Riess invited Dagle to let him know if Dagle had "any questions or concerns." (Resp. Exh. 1, p. 1). Dagle did not respond until two days later, on Friday September 5, 2014, when he asserted that the "recoupment decision is in violation of the Collective Bargaining Agreement and Stericycle's obligations under federal law," but did not request bargaining. (Resp. Exh. 1, p. 5). It was not until the morning of Tuesday, September 9, 2014—six days after receiving notice of Respondent's plan—that Dagle asserted that any "recoupment schedule must be negotiated with the Union." However, Dagle, by his own admission, conditioned bargaining on Respondent restoring the "status quo," which he defined as paying back any monies already deducted. When Riess explained that the payroll had already been processed for September 12, but that Respondent would hold off with the next two deductions if the Union wished to discuss the issue, Dagle rejected this offer out of hand. Dagle's request to bargain was untimely with respect to the first deduction, and the Union waived any right to bargain.

B. The Second and Third Deductions Did Not Constitute Substantial and Material Changes in Wages and Benefits.

In the event that the General Counsel and/or the Charging Party take exception to the Judge's dismissal of the unilateral recoupment issue, Respondent has taken exception to the Judge's finding that the second and third deductions constituted substantial and material changes. (JD 31: 37-38; 22: 12-14). While wages and benefits are without question a mandatory subject of bargaining, Respondent did not effectuate any change in employee wages and benefits. The amounts deducted were exactly what the employees were required to contribute and Respondent was explicitly authorized to deduct. No employee was paid less than what he/she was contractually entitled to receive. No "change" occurred in employee wages and benefits.

Assuming, arguendo, that the retro-deductions can be characterized as a "change," a "unilateral change with regard to a mandatory subject of bargaining violates Section 8(a)(5) and

(1) only if the change is a 'material, substantial, and significant' one." *Berkshire Nursing Home,* 345 NLRB 220, 220 (2005) (citing *Crittendon Hospital*, 342 NLRB 686, 686 (2004)). Here, any "change" that can be said to have occurred with regard to employee wages does not rise to the level of a "substantial, material and significant" change. In *Alexander Linn Hospital Assoc.,* 288 NLRB 103 (1988), *enf'd sub nom. NLRB v. Wallkill Valley General Hosp.,* 866 F.2d 632 (3d Cir. 1989), due to an administrative error, the employer failed to deduct union dues on behalf of some 13 unit employees over a period of time, but continued to remit the dues to the union. The employer decided to recoup the amounts owed over two pay periods if greater than $10 and over one pay period if less than $10. The amounts owed by the employees ranged from $1.60 to $38.60. The employer declined to bargain the issue. The administrative law judge noted that although the General Counsel had cited no supporting authority, he would assume arguendo "that the payroll correction here in issue rises to the level of a mandatory subject of bargaining." *Id.* at 118. Nevertheless, he concluded that there had "been no material, substantial, or significant change in a condition of employment." *Id.* The judge recommended dismissal of this allegation, and the Board agreed "essentially for the reasons set forth by the judge." *Id.* at 104.

Much the same can be said for Respondent's deductions in this case. There was no permanent or ongoing change in wages, the amounts deducted were clearly owed, and Respondent had a contractual right to deduct the amounts owed. Although the amounts deducted by Respondent were greater than those deducted by the employer in *Alexander Linn,* the events in that case occurred in 1978; whereas, the events here occurred in 2014. The Board's decision in *Alexander Linn* does not recite the actual wage rates in place; however, a September 1978 BLS survey of wage rates in hospitals reflects that the average wage rates for general duty nurses at that time was between $5.84 per hour and $8.32 per hour, with the average wage in New

York/New Jersey being $7.59 per hour.[4] At the average rate of $7.59, the maximum deduction taken by Alexander Linn (New Jersey) in any pay period was $19.30, or 2.5 hours of pay. Here, the maximum deduction taken by Respondent in any pay period was $55.65 for Harry Banks, whose wage rate was $24.55 per hour. This deduction equates to 2.3 hours of pay.

The Judge, however, appears to have been influenced by the fact that Respondent took deductions over three pay periods rather than two pay periods as was the case in *Alexander Linn.* But even if that is the proper focus, which Respondent denies, the maximum total hours of pay recouped by Respondent was roughly 6.9 hours of pay compared to 5 hours pay in *Alexander Linn.* Respondent contends that the amounts deducted by Respondent were no less "insignificant" than the amounts deducted in *Alexander Linn.*

CONCLUSION

Respondent respectfully requests that the Second Consolidated Complaint, as amended, be dismissed in its entirety.

Dated this 23rd day of December 2016

/s/ Charles P. Roberts III

Constangy, Brooks, Smith & Prophete LLP
100 N. Cherry Street, Suite 300
Winston-Salem, NC 27101
Tel: (336) 721-1001
Fax: (336) 748-9112
croberts@constangy.com

[4] *Industry Wage Survey: Hospitals and Nursing Homes, September 1978*, U.S. Dept. of Labor, Bureau of Labor Statistics, November 1980, Bulletin 2069. Respondent accessed this information at: http://journals.lww.com/ajnonline/Citation/1981/09000/Salary_Figures_For_Staff_Nurses_Updated_to_1980_.6.aspx through an American Journal of Nursing article, Volume 81 – Issue 9 – pages 1560, 1562 (September 1981).

CERTIFICATE OF SERVICE

I hereby certify that on this day, I served the forgoing BRIEF by electronic mail on the following parties:

Lea Alvo-Sadiky
Field Attorney
NLRB – Region 04
615 Chestnut Street
Suite 710
Philadelphia, PA 19106-4413
Lea.Alvo-Sadiky@nlrb.gov

Claiborne S. Newlin
Meranze, Katz, Gaudioso & Newlin, PC
121 S. Broad Street, 13th Floor
Philadelphia, PA 19107
cnewlin@meranzekatz.com

This the 23rd day of December 2016.

s/ Charles P. Roberts III